IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

NO. 76-761

CLAUDE D. BALLEW,
Petitioner,

vs.

STATE OF GEORGIA,
Respondent.

BRIEF OF RESPONDENT

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ARGUMENT

I.

A JURY OF FIVE PERSONS IS CONSTITUTIONALLY ADEQUATE FOR THE TRIAL OF MISDEMEANOR CASES WHERE THE MAXIMUM POSSIBLE IMPRISONMENT IS TWELVE MONTHS.

Petitioner was tried in the Criminal Court of Fulton County[1] by a jury of five persons[2] selected from a panel of twelve prospective jurors qualified to serve, with the Petitioner having four peremptory challenges, the State having three peremptory challenges, and with the Petitioner having benefit of the first and last challenge.

[1] The name of the Criminal Court of Fulton County has been changed, effective January 2, 1977, by the merger of the Criminal Court of Fulton County with the Civil Court of Fulton County into a court known as and named the State Court of Fulton County. Georgia Laws 1976 Session, p. 3023.

[2] Effective March 24, 1976, the number of jurors was changed from five to six in the Criminal Court of Fulton County. Georgia Laws 1976 Session, p. 3019.

It was necessary that each individual juror believe, beyond a reasonable doubt, that Petitioner was guilty of the offenses with which he was charged and that all the elements of the crimes were present, including the fact of obscenity. Jury verdicts in Georgia must be unanimous, *Ball v. The State of Georgia*, 3 Ga. App. 162, 20 S.E. 888 (1911), and the jury in this case was so charged (App. 10).

The five-man jury comports with this Court's decision in *Williams v. Florida*, 399 U.S. 78 (1970). In that case, this Court held a six-man jury was constitutionally adequate in State trials under the Sixth and Fourteenth Amendments. This Court said:

> "The purpose of the jury trial, as we noted in *Duncan*, is to prevent oppression by the Government. 'Providing an accused with the right to be tried by a jury of his peers gave him an inestimable safeguard against the corrupt or overzealous prosecutor and against the complaint, biased, or eccentric judge.' *Duncan v. Louisiana*, supra, 391 U.S., at 156; 88 S. Ct., at 1451. Given this purpose, the essential feature of a jury obviously lies in the interposition between the accused and his accuser of the common-sense judgment of a group of laymen, and in the community participation and shared responsibility that results from that group's determination of guilt or innocence. The performance of this role is not a function of the particular number of the body that makes up the jury. To be sure, the number should probably be large enough to promote group deliberation, free from outside attempts at intimidation, and to provide a fair possibility for obtaining a representative cross section of the community. But we find little reason to think that these goals are in any meaningful sense less likely to be achieved when the jury numbers six, than when it numbers 12—*particularly if the requirement of unanimity is retained. And, certainly the reliability of the jury as a fact-finder hardly seems likely to be a function of its size.*
>
> It might be suggested that the 12-man jury gives a defendant a greater advantage since he has more 'chances' of finding a juror who will insist on acquittal and thus prevent conviction. But the advantage might just as easily belong to the State, which also needs only one juror out of twelve insisting on guilt to prevent acquittal." (Emphasis supplied) *Williams v. Florida*, 399 U.S. 78, 103, 104 (1970).

It is clear from *Williams* that mere size is not the controlling factor in the Sixth Amendment right to a jury trial. One important factor is the insulation provided by a law body standing between the government and the defendant. See *Baldwin v. New York*, 399 U.S. 66 (1970); *Torres v. Delgado*, 391 F. Supp. 379 (D.C.P.R. 1974), affirmed 510 F.2d 1182 (1st Cir. 1975).

The Petitioner has not complained that an arbitrary exclusion of a particular class has taken place. *Williams v. Florida*, 399 U.S. 78 (1970).

Petitioner argues that a lesser number than 12 or six denies a cross section—however, this Court said in *Williams:*

> ". . . the concern that the cross section will be diminished if the jury is decreased in size from 12 to six seems an unrealistic one." *Williams v. Florida*, 399 U.S. 104 (1970).
>
> As one commentator has said (speaking of civil cases),
>
> "Because the members of the five-man jury represent a cross section unit of the community, they will continue to bring into the courtroom the diversity of viewpoint, the objectivity of detach-

ment, the non-professional sense of values, and the spirit of justice and fairness unhampered by precedent, which are the foundations of the jury system as we respect it. Moreover, all of the historic values placed upon the jury as a 'casual tribunal' attach readily to the five-member jury as it actually functions in the jury box; human virtues—and shortcomings—are fully present whether there are twelve or five jurors." *THE FIVE-MAN CIVIL JURY*, 51 Geo. L.R. 120, 137 (1962).

This court has not decided what the minimal number of jurors may be; however, in *Williams* the Court stated in a footnote that six is above the minimum:

> "We have no occasion in this case (*Williams*) to determine what minimum number can still constitute 'a jury,' *but we do not doubt that six is above that minimum*" (Emphasis supplied), *Williams v. Florida*, 399 U.S. 78, 92 N. 28.

If six is above the minimum, five cannot be below the minimum. There is no number in between.

In *Johnson v. Louisiana*, 406 U.S. 356 (1971) the Court considered the jury system of Louisiana and wrote:

> "Louisiana has permitted less serious crimes to be tried by five jurors with unanimous verdicts, more serious crimes have required the assent of nine of 12 jurors, and for the most serious crimes, a unanimous verdict of 12 jurors is stipulated. In appellant's case, nine jurors rather than five or 12 were required for a verdict. We discern nothing invidious in this classification. We have held that the States are free under the Federal Constitution to try defendants with juries of less than 12 men. *Williams v. Florida*, 399 U.S. 78 (1970).

> . . . As to the crimes triable by a five-man jury, if appellant's position is that it is easier to convince nine of 12 jurors than to convince all of five, he is simply challenging the judgment of the Louisiana Legislature. That body obviously intended to vary the difficulty of proving guilt with the gravity of the offense and the severity of the punishment. We remain unconvinced by anything appellant has presented that this legislative judgment was defective in any constitutional sense." *Johnson v. Louisiana*, 406 U.S. 356, 364, 365 (1971).

The Court again in *Colgrove v. Battin*, 413 U.S. 149 (1973) was faced with making a decision on the question of the number of jurors required, this time the question arose under the Seventh Amendment and concerned civil juries. The Court in following *Williams v. Florida*, supra, stated:

> ". . . Keeping in mind the purpose of the jury trial in criminal cases to prevent government oppression, *Williams*, 399 U.S., at 100, 90 S. Ct., at 1905, and, in criminal and civil cases, to assure a fair and equitable resolution of factual issues, *Gasoline Products Co. v. Champlin Co.*, 283 U.S. 494, 498, 51 S. Ct. 513, 514, 75 L. Ed. 1188 (1931), the question comes down to whether jury performance is a function of jury size. In *Williams*, we rejected the notion that 'the reliability of the jury as a factfinder . . . [is] a function of its size,' 399 U.S., at 100-101, 90 S. Ct., at 1906, and nothing has been suggested to lead us to alter that conclusion. Accordingly, we think it cannot be said that 12 members is a substantive aspect of the right of trial by a jury." 413 U.S. 149, 157; 93 S. Ct. 2448, 2453 (1973).

It is clear that the Constitution does not require any specific number of persons to make up a trial jury; and had the framers of the Constitution, and the Amend-

ments thereto, intended that trial juries be composed of not less than twelve persons, or any other number, the minimum number could easily have been written into the Constitution. This was not done, and therefore, it can be assumed that it was intended that the number required be flexible and left to Congress and the legislatures of the various states to make that determination.

In *Williams v. Florida*, supra, a six-person jury was held to be constitutionally adequate in a case involving the felony offense of robbery and where a life sentence was imposed. In this case, the Petitioner was tried by a five-person jury for misdemeanor offenses where the maximum imprisonment could be no more than twelve months for each offense.

It is clear that the Sixth Amendment requires a jury trial in any case other than a "petty offense," *Baldwin v. New York*, 399 U.S. 66 (1970), but it is also clear that the number of jurors is constitutionally irrelevant as long as it is enough to carry out the jury's historical function and five jurors is adequate for that purpose.

II.

JURY INSTRUCTIONS ON SCIENTER THAT REQUIRED THE STATE TO PROVE BEYOND A REASONABLE DOUBT THAT THE ACCUSED HAD KNOWLEDGE, EITHER ACTUAL OR CONSTRUCTIVE, AND THAT CONSTRUCTIVE KNOWLEDGE IS KNOWLEDGE OF FACTS WHICH WOULD PUT A REASONABLE AND PRUDENT PERSON ON NOTICE AS TO THE SUSPECT NATURE OF THE MATERIAL, ARE SUFFICIENT TO MEET CONSTITUTIONAL MINIMUM STANDARDS.

Section 26-2101 of the Criminal Code of Georgia provides, in part, as follows:

> "(a) a person commits the offense of distributing obscene materials when he sells, lends, rents, leases, gives, advertises, publishes, exhibits or otherwise disseminates to any person any obscene material of any description, knowing the obscene nature thereof, or offers to do so, or possesses such material with the intent to do so, provided that the word 'knowingly,' as used herein, shall be deemed to be either actual or constructive knowledge of the obscene contents of the subject matter, and *a person has constructive knowledge of the obscene contents if he has knowledge of facts which would put a reasonable and prudent person on notice as to the suspect nature of the material. . . .*" (Emphasis added)

The trial court charged the jury on scienter according to the provisions of the Georgia statute, supra, and this charge is in keeping with a line of cases on the question of scienter in obscenity cases dating back to the year 1896 when the court held that the person charged with the offense of mailing obscene material must know *or have notice of the contents* of the material.

> "The inquiry, in proceedings under Rev. Stat. §3893, is whether the paper charged to have been obscene, lewd, and lascivious was in fact of that character, and if it was of that character and was deposited in the mail *by one who knew or had notice at the time of its contents*, the offense is complete, although the defendant himself did not regard the paper as one that the statute forbade to be carried in the mails." (Emphasis added) *Rosen v. United States*, 161 U.S. 29 (1896).

Rosen did not require the accused to have knowledge of the obscenity of the material, only *notice of its contents.*

". . . Eyewitness testimony of a bookseller's perusal of a book hardly need be a necessary element in proving his awareness of its contents. The circumstances may warrant the inference that he was aware of what a book contained, despite his denial.

We need not and most definitely do not pass today on what sort of mental element is requisite to a constitutionally permissible prosecution of a bookseller for carrying an obscene book in stock; whether honest mistake as to whether its contents in fact constituted obscenity need be an excuse; whether there might be circumstances under which the State constitutionally might require that a bookseller investigate further, or might put on him the burden of explaining why he did not, and what such circumstances might be. . . ." *Smith v. California*, 361 U.S. 147, 154 (1959).

The Georgia statute, 26-2101 supra, is very similar and compares to New York statutes dealt with by the Court in *Mishkin v. New York*, 383 U.S. 502 (1966) and *Ginsberg v. New York*, 390 U.S. 629 (1968).

The *Mishkin* case pointed out that the New York Court of Appeals had construed Section 1141 of the New York Penal Law to require the "vital element of scienter," and it defined the required mental element in these terms:

> "a reading of the statute (§1141) as a whole clearly indicates that only those who are in some manner aware of the character of the material they attempt to distribute should be punished. It is not innocent but calculated purveyance of filth which is exorcised. . . ."

Section 26-2101 of the Georgia Code requires "knowledge of facts which would put a reasonable and prudent person on notice," while Section 1141 of the New York Penal Law requires the accused to be "in some manner aware."

The statute dealt with in *Ginsberg* defined knowingly as "knowledge" of, or "reason to know" of, the character and content of the material.

Neither *Mishkin* nor *Ginsberg* requires actual knowledge as contended by the Petitioner herein. Both cases were reviewed and followed in *Hamling v. United States*, 418 U.S. 87 (1974), where the Court construed 18 U.S.C. §1461, and held:

> "To require proof of a defendant's knowledge of the legal status of the materials would permit the defendant to avoid prosecution by simply claiming that he had not brushed up on the law. Such a formulation of the scienter requirement is required neither by the language of 18 U.S.C. §1461 nor by the Constitution."

In the instant case, the Petitioner was arrested on two separate occasions for showing the same motion picture film. Suffice it to say that he had actual notice and knowledge of the nature of the film without any doubt on the second occasion, and therefore, the charge given the jury on constructive knowledge, even if error, was harmless to the Petitioner.

In the case of *Kuhns v. California*, No. 76-970, this Court recently denied petition for certiorari, 21 CrL 4078, to review jury instructions based upon the California obscenity statute which defines "knowingly" as "[be] aware of the character of the matter. . . ." *California v. Kuhns*, 61 Cal. App. 3d 735, 132 Cal. Rptr.

725, 737 (1976).

Petitioner in this case concedes that proof of scienter may be made by circumstantial evidence (Pet. Br. 17). Respondent contends and respectfully submits that to prove the accused was aware of facts that would put a reasonable and prudent person on notice of the suspect character of the material, is proof of knowledge of the character of the material by circumstantial evidence.

Petitioner contends that the only evidence to show his knowledge of the nature, character or contents of the film was a statement by another employee that the Petitioner is the manager of the theater (Pet. Br. 12). Be it remembered that the Petitioner was twice arrested for the exhibition of the film in question and that on the day before the second arrest, the Petitioner, having recognized the officer, hesitated and reluctantly sold the officer an admission ticket (Tr 29, 30). This evidence shows that the Petitioner was aware that he was engaged in proscribed conduct by exhibiting obscene material, yet he continued that conduct and was again arrested.

There was further evidence that a sign was posted showing that there was being displayed in the theater an "X-rated movie and nudity, etc., if under age please do not enter" (Tr 59). The theater management cannot advertise a fact to give the public notice of the nature of the motion picture film without being aware themselves of the fact so advertised. The Petitioner must take notice of that which he gives others notice.

A sign posted which reads "Adults Only" is admissible to show scienter. See *People v. Adler*, 25 Cal. App. 3d 24, 100 Cal. Rptr. 726 (1972); *People v. Harris*, 192 Cal. App. 2d 887, 13 Cal. Rptr. 542 (1961); *Cherokee*

News and Arcade, Inc. v. State, 509 P. 2d 917 (Okla. Crim. App. 1973); *Orito v. State*, 55 Wis. 2d 161, 197 N.W. 2d 763 (1972).

A sign posted which reads "X-rated—Potentially Offensive to Some People" is admissible on the issue of scienter. *Price v. Commonwealth*, 213 Va. 113, 189 S.E. 2d 324 (1972).

In the case of *Nash v. United States*, 229 U.S. 373 (1913), the Court said:

> "In many instances a man's fate depends upon his rightly estimating, that is as the jury subsequently estimates it, some matter of degree, and there is no constitutional difficulty in the way of enforcing the criminal provisions of the Sherman Anti Trust Act on the ground of uncertainty as to the prohibitions."
>
> Whenever the law draws a line, there will be cases very near each other on opposite sides. The precise course of the line may be uncertain, but no one can come near it without knowing that he does so, if he thinks, and if he does so, it is familiar to the criminal law to make him take the risk. *Nash v. United States*, supra; *United States v. Wurzbach*, 280 U.S. 396, 399 (1930). One who goes perilously close to an area of proscribed conduct shall take the risk that he may cross the line. *Boyce Motor Lines, Inc. v. United States*, 342 U.S. 337, 340.
>
> The evidence necessary to prove guilty knowledge in the prosecution of one charged with the exhibition of an obscene motion picture film differs greatly with that necessary to show guilty knowledge on the part of a book dealer charged with distributing obscene books.

> ". . . It would be impossible for a book dealer to familiarize himself with the contents of all the books he offers for sale, and proof of guilty knowledge would certainly be a condition precedent to conviction. The exhibitors of motion pictures, however, cannot seriously contend any lack of knowledge of the contents of a particular film. It is relatively easy and also the responsibility of film exhibitors to preview a motion picture before releasing it for public showing. . . ." *Hosey v. Jackson*, 309 F. Supp. 527, 532 (S.D. Miss. 1970), reversed on other grounds 401 U.S. 987 (1971).

In summary, on the question of scienter, the Georgia law requires and the jury was instructed that the State must prove, as a bare minimum, that the Petitioner had knowledge of facts which would put a reasonable and prudent person on notice as to the suspect nature of the material. No more has ever been required. "Notice of its contents" is required by *Rosen v. United States*, supra; "in some manner aware" was sufficient in *Mishkin v. New York*, supra; "reason to know" was sufficient in *Ginsberg v. New York*, supra; "be aware of the character of the matter" was sufficient in *Kuhns v. California*, supra; eyewitness testimony that the Petitioner viewed the film is not necessary, *Smith v. California*, supra; proof of knowledge of the legal status of the material is not required, *Hamling v. United States*, supra; and under the rationale of *Hosey v. Jackson*, supra, in a film case such as this, guilty knowledge may be presumed.

III.

THE MOTION PICTURE FILM "BEHIND THE GREEN DOOR" IS OBSCENE AND IS THEREFORE NOT PROTECTED EXPRESSION UNDER THE FIRST AND FOURTEENTH AMENDMENTS OF THE UNITED STATES CONSTITUTION.

The trial jury, after receiving proper charges as to the law involved, applied the law and returned its verdict finding the motion picture film "Behind the Green Door" obscene.

In its opinion on review of this case, the Court of Appeals of Georgia in describing the film wrote:

> "Our duty to uphold the constitutional guarantees is no less than that of the justices of the respective Supreme Courts of the United States and of this State, and although we abhor even the suggestion of censorship we nevertheless viewed an exhibition of this film in its entirety. . . .
>
> The film, considered as a whole, and applying contemporary community standards, predominantly appeals to the prurient interest. It is without redeeming social value, and it is a shameful and morbid exhibition of nudity with particular and all-encompassing emphasis on sexual acts. It goes substantially beyond customary limits of candor in representing and portraying nudity and sex. The film presents patently offensive exhibitions and representations of ultimate sexual acts and manipulations, normal and perverted. It shows unabashedly offensive and lewd views of the genitals of both male and female participants, and is replete with portrayals of individual and group acts of masturbation, cunnilingus, fellatio and sexual intercourse. It is degrading to sex. Except for the

opening and a few other scenes toward the conclusion, it is rank, hard core pornography, and each exhibition in the theatre was 'a public portrayal of hard core sexual conduct for its own sake, and (presumably) for the ensuing commercial gain.' *Miller v. California*, 413 U.S. 15, 35, supra. The film 'Behind the Green Door' is obscene as a matter of constitutional law and fact, and is unprotected by the First and Fourteenth Amendments." . . . *Ballew v. The State*, 138 Ga. App. 530.

Petitioner cites a long line of cases in support of his contention that this Court should make an independent review and determination of obscenity vel non. It appears to be his contention that this Court should make an independent review and determination of obscenity vel non on all materials brought into question in the State Courts. With the exception of *Jenkins v. Georgia*, 418 U.S. 153 (1974), all the cases cited by the Petitioner were decided during the period between *Roth v. United States*, 354 U.S. 476 (1957) and *Miller v. California*, 413 U.S. 15 (1973); a period when no majority of the Court could agree on a standard to determine what constitutes obscene, pornographic material subject to regulation under the States' police power, and at which time convictions were reversed by this Court summarily.

> "Apart from the initial formulation in the *Roth* case, no majority of the Court has at any given time been able to agree on a standard to determine what constitutes obscene, pornographic material subject to regulation under the States' police power. See, e.g., *Redrup v. New York*, 386 U.S. at 770-771, 87 S. Ct. at 1415-1416. We have seen 'a variety of views among the members of the Court unmatched in any other course of constitutional adjudication.' *Interstate Circuit, Inc. v. Dallas*, 390

> U.S., at 704-705, 88 S. Ct. at 1314 (Harlan, J., concurring and dissenting)." . . . *Miller v. California*, 413 U.S. 15, 22, 88 S. Ct. 2607, 2614.
>
> "In the absence of a majority view, this Court was compelled to embark on the practice of summarily reversing convictions for the dissemination of materials that at least five members of the Court, applying their separate tests, found to be protected by the First Amendment. *Redrup v. New York*, 386 U.S. 767, 87 S. Ct. 1414, 18 L. Ed. 2d 515 (1967). Thirty-one cases have been decided in this manner. Beyond the necessity of circumstances, however, no justification has ever been offered in support of the *Redrup* 'policy.' See *Walker v. Ohio*, 398 U.S. 434-435, 90 S. Ct. 1884, 26 L. Ed. 2d 385 (1970) (dissenting opinions of Burger, C. J., and Harlan, J.). The *Redrup* procedure has cast us in the role of an unreviewable board of censorship for the 50 States, subjectively judging each piece of material brought before us." *Miller v. California*, 413 U.S. 15, 88 S. Ct. 2607, 2614 (Footnote 3).

In *Jenkins v. Georgia*, supra, the film "Carnal Knowledge" was in question and the scenes in which sexual conduct including "ultimate sexual acts" is to be understood to be taking place, the camera does not focus on the bodies of the actors at such times. Such is not the case in the film "Behind the Green Door" where, not only does the camera focus on the bodies of the "actors" while engaged in "ultimate sexual acts," but it shows offensive and lewd views of the genitals of both male and female participants.

Petitioner contends that the motion picture film "Behind the Green Door" is an artistic work of national acclaim. There is absolutely nothing in the record or the transcript of the evidence in this case to support that contention.

Petitioner urges the Court to lift all checks and restraints on the distribution of obscene materials because of the widespread concern over our overworked judiciary. We, too, are concerned over our overworked judiciary. We in the prosecutorial field are a part of the same system that finds itself overworked because of the high incidence of criminal activity. Is this sufficient reason to back off, to shirk our duty and to let the purveyors of filth have a free hand? Would the Petitioner suggest that the Court give pill peddlers, burglars, rapists, robbers, murderers, or any of them a free hand because of concern over our overworked judiciary?

The motion picture film "Behind the Green Door" is hard-core pornography at its worst and its showing by the Petitioner on both occasions for which he was convicted was "calculated purveyance of filth."

CONCLUSION

For all the foregoing reasons, Respondent urges the Court to affirm the conviction in this case.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that I am a member of the Bar of The Supreme Court of the United States in good standing, and that I have this day deposited in the United States Mail three (3) copies of the foregoing Brief of Respondent with first-class postage prepaid, addressed to Robert Eugene Smith, Esquire, 1409 Peachtree Street, N.E., Atlanta, Georgia 30309, Attorney for Petitioner.

This _____ day of July, 1977.

LEONARD W. RHODES
Counsel for Respondent